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No. 87-1799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NOBEL SCIENTIFIC INDUSTRIES, INC.,
Petitioner,

v.

BECKMAN INSTRUMENTS, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the District Court's grant of summary judgment, where an antitrust plaintiff failed to make a sufficient showing of:

a) any conduct which constituted a tie-in;

b) any relevant product market in which defendant exercises market power;

c) any concerted refusal to deal?

RULE 28.1 LISTING

The parent company of Respondent Beckman Instruments, Inc. is SmithKline Beckman Corporation. Respondent has no subsidiaries or affiliates.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Beckman Instruments, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 831 F.2d 537 (4th Cir. 1987).

STATEMENT

Respondent, Beckman Instruments, Inc. ("Beckman"), manufactures and sells clinical laboratory analyzers which will quickly perform common laboratory tests when blood samples are mixed with chemical reagents and analyzed. Petitioner, Nobel Scientific Industries, Inc. ("Nobel"), is one of approximately twelve different companies (A. 18; Ct.App.Jt.Apx. 1353-4, 1358, 1461, 1471-2, 1477-8, 1481-4)[1] which marketed reagent that could be utilized with the Beckman analyzers. Soon after commencing to sell reagent useable with the Beckman ASTRA system, Nobel filed this suit claiming violations of Sections One and Two of the Sherman Act, 15 U.S.C. §§1, 2. After substantial discovery had taken place, including one hundred eighteen depositions, Beckman sought and was granted a summary judgment by the District Court (A. 3-35). The judgment was affirmed by the Court of Appeals on the opinion of the District Court (A. 1-3).

The Courts below found "overwhelming evidence that the market for reagents in fact had much competitive activity, including price competition, belying any claim of monopoly or dangerous possibility of monopoly," (A. 18) and that "Beckman's actions do not, as a matter of law, constitute illegal tie-ins." (A. 25)

The Courts below held that,

> [T]here is uncontradicted evidence that other machines existed in the past and exist now that com-

[1] Record references will be consistent with those used in the Petition. (A. ____) will refer to the Appendix to the Petition, and (Ct.App.Jt.Apx. ____, p. ____) will refer to the Joint Appendix filed with the Court of Appeals.

> pete with the ASTRA instruments and that do the same functions. . . . In general customers can choose between various alternative machines or combinations of machines to do various functions and if the price of reagent is too high, the laboratories will switch to other analyzers in order to cut costs. . . .
>
> The uncontradicted testimony indicates that if the price of reagents or other services rises too high, then the hospitals and laboratories will buy other instruments. (A. 12-13)
>
> Given this competition in the analyzer market, the reagent market, which seems to be distinct, must include reagents for all competing analyzers and not just for Beckman instruments. . . . Interchangeability and the cross elasticity of demand test, have been met. (A. 17)
>
> Overall, the nature of Beckman's discount plans, as well as the presence of competition for the reagent business, and the frequent price cuts by both Beckman and by Nobel and others, strongly suggest that no tying arrangement is or was occurring. Instead, Beckman's actions must be seen as competitive with the actions of other companies, and the discount plans themselves have no aspects that can be considered unlawful. (A. 28)

Petitioner has embarked on a wholesale mischaracterization of the record (E.g., Pet. 4-6) in an effort to gain this Court's attention. Petitioner engaged in similar conduct below. Respondent invites the Court, as we invited the Courts below,[2] to compare Petitioner's statement of the

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[2] Respondent's brief to the Court of Appeals contained the following footnote reference: "Nobel's Brief ('NB') is replete with statements allegedly supported by 'record' references, which are not, in fact, so supported. We specifically refer to some egregious examples in the course of this brief, but space considerations preclude specific consideration of many of them. This was also true

(Footnote continued on following page)

case with the opinion and record references of the Courts below.

The Petitioner has sought, since losing on summary judgment, to give the impression of a myriad of factual issues being present in this case. The case is factually complex. However, the evidence which was uncontradicted in the record, together with the dispositive failures of Petitioner's proof found by the Courts below, left no genuine issue for trial.

For example, Nobel makes reference in the Petition to a purportedly "widely accepted 'mark-up formula' " used by its expert to "prove Beckman's monopoly power" (Pet. 7, n.5). In fact, this "widely accepted" formula was apparently derived by Nobel's expert himself after he concluded it was an "impossibility" to define a relevant product market in this case "because it would be arbitrary" (Ct.App.Jt.Apx. II. 1227-8).[3] The formula basically ignored the principles of reasonable interchangeability and supply substitutability that are the hallmark of market analysis. Instead, Nobel's expert compared Beckman's list prices for reagents to *Nobel's* costs (Ct.App.Jt.Apx. III 1744), and concluded that the amount of markup was evidence of Beckman's monopoly.[4] There is no case in which this

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[2] *continued*
in the District Court, and there Beckman advised the Court 'To the extent that the Court may be troubled or curious as to any Nobel charge, we would ask the Court to examine the record evidence which Nobel provides to support the charge.' (App. 1852 n.2) We reiterate that request to this Court." Beckman Brief, p. 2.

[3] The formula represented his attempt to "be immune to successful cross-examination." (*Id.*)

[4] Since the formula utilizes *list* price (Pet. 7, n.5) and Nobel's *list* price is the same as Beckman's (Ct.App.Jt.Apx. III, 1892), application of this formula results in Nobel, as well as Beckman, allegedly possessing "monopoly power."

"formula" approach to proof of monopoly power, which would eliminate market definition, has been accepted.

The "market share" statistics which Nobel cites in the Petition (Pet. 7, 13-14) were contained in graphs created by a Nobel employee based upon a variety of materials which were not of record. (Ct.App.Jt.Apx. III, p. 1960) The employee did not know where the materials had been obtained. (*Id.*) The graphs purported to calculate the percentage of total industry-wide tests for various analytes that were conducted on a "stat," or as soon as possible basis, from those performed on a "routine" basis. This calculation was the product of an unexplained "algorithm" prepared by Nobel's president, whose affidavit provided the purported foundation for the graphs which the president admittedly did not prepare. (Ct.App.Jt.Apx. III, pp. 1943, 2036-42) These graphs constituted all of Nobel's statistical evidence. The authenticity, accuracy and validity of the data they depicted was not established by a competent witness. This quality of evidence was appropriately disregarded. Even had it been accepted, it would not have affected the result.

Petitioner complains that of the 45 references to the record in the District Court's opinion, 40 refer to "Beckman's evidence" (Pet. 13). Predominantly, "Beckman's evidence" consisted of admissions in the testimony of Nobel employees, statements by employees of American Scientific Products ("SP"), which was the exclusive national distributor of Nobel reagents, and the testimony of laboratory consumers. Based upon this record, which was largely undisputed by Nobel in the District Court (A. 4, 12; Ct.App. Jt.Apx. 1534, 1538), summary judgment was entered and affirmed.

Nobel's claim that issues worthy of certiorari are presented by this case is belied by the findings of the Courts below that:

1) Nobel failed to establish that there was any tie-in as a matter of fact between any Beckman products (A. 25-28), as well as a failure to establish evidence of economic power within a relevant product market (A. 28-33);

2) Nobel failed to establish a relevant product market within which to consider its allegations of monopolization and attempted monopoly (A. 11, 21); and

3) Nobel failed to establish any evidence of a concerted refusal to deal (A. 34-35).

REASONS FOR DENYING THE WRIT

I. The Courts Below Correctly Determined That There Were No Tie-Ins Because All Of Beckman's Products Are Available For Separate Purchase

Nobel seeks to have this Court grant certiorari to review an issue concerning whether the *per se* classification of tying as to "patented products survived *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984)?" (Pet. p. i) This case does not present this issue. The Courts below found, based upon the undisputed record, that there were no tie-ins at all created by Beckman's business conduct. (A. 25-28)

> [N]o tying arrangement exists if there is freedom to choose whether to buy the two products separately or as a unit. . . .

> Here the evidence is undisputed that the items could be bought separately. There are also various package deals available by Beckman and by other suppliers, and different packages are priced to compete with various needs. There is, however, no evidence of any one package having dominance or of package purchases being the only viable option. . . .
>
> Overall, the nature of Beckman's discount plans, as well as the presence of competition for the reagent business, and the frequent price cuts by both Beckman and by Nobel and others, strongly suggest that no tying arrangement is or was occurring. Instead, Beckman's actions must be seen as competitive with the actions of other companies, and the discount plans themselves have no aspects that can be considered unlawful. (A. 25, 28)

The undisputed record contained no evidence of any tie. On the contrary, the evidence shows that purchasers of Beckman analyzers were offered the choice of acquiring the entire system—analyzer, reagents, supplies and service—or acquiring each item separately. Approximately half of all ASTRA users elected separate purchases. (A. 25-6) Accordingly, it was not essential to the decision to further reject Nobel's tying argument by analyzing the failure of Nobel's proof of Beckman's alleged economic power.

The Courts below held that Nobel had offered no evidence of Beckman's possession of sufficient economic power within the tying product market to "force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). (A. 30) In the Petition, Nobel emphasizes that it offered evidence that certain "parts and subassemblies" of the Beckman ASTRA and benchtop analyzers are patented (Ct.App.Jt.Apx. 1485, 1522-5), and

asserts that this evidence alone was sufficient to make out:

> . . . *prima facie* evidence of market power ("economic power" or "leverage") in the tying product for purposes of *per se* condemnation of tying arrangements, and negates the need for independent proof of market power in a relevant product market for the tying product. (Pet. 10)

Petitioner's analysis conveniently omits reference to the determination that there were no tie-in arrangements in fact, which eliminates the question Petitioner seeks to have reviewed. Even if the question were reviewable, however, the decision of the Courts below is correct and not "inconsistent" or in "sharp contrast" (Pet. 11), much less in jurisdictional conflict with the questionable[5] Ninth Circuit holding in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985). In *Digidyne* there was a plain tie: in order to license the RDOS operating system software, it was necessary to purchase the NOVA central processing unit. As noted above, purchasers of Beckman analyzers were not required to buy reagents as a part of the analyzer purchase—and half of Beckman's customers elected to purchase their reagents separately. No issue of forced purchase was present in this case. This is not the case in which the *Digidyne* rationale could or should be examined.

Moreover, as the Courts below correctly concluded (A. 32-33), the intellectual property rights involved in this Court's earlier decisions in tying situations concerned an

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[5] See 473 U.S. at 908-9 (dissent of Justices White and Blackman).

exclusive right or a patent covering a whole product.[6] Patents on parts and subassemblies do not suffice alone to give rise to a presumption of forcing in the absence of market analysis. The concurring opinion in *Jefferson Parish*, 466 U.S. at 37, n.7, cited by the District Court below (A. 33), makes this plain.

Thus, the first question presented by the Petition does not arise as (i) the undisputed evidence did not permit the finding of a tie in fact, and (ii) the Courts below correctly resolved the issue of market power in accordance with the decisions of this Court, and not in conflict with the decision of another Circuit.

II. This Court Has Afforded Lower Courts Ample Guidance With Respect To Summary Judgment Standards

Sounding a tocsin of alarm, Petitioner contends that this Court has failed to establish a standard for summary judgment in antitrust cases:

> The issue is an important one, upon which the continued viability of the antitrust laws may well depend. . . . the absence of any standard established by this Court as to how much evidence an antitrust plaintiff must present to survive a motion for summary judgment in a relevant product market case, effectively repeals the antitrust laws from the standpoint of private plaintiffs in many district courts. (Pet. 16)

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[6] *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *International Salt Co. v. United States*, 332 U.S. 392 (1947). *Standard Oil of California v. United States*, 337 U.S. 293 (1949), cited by Nobel (Pet. 10) is not a tie-in case, nor were patents at issue. Nobel refers to *dictum*.

The fact is that this Court has recently afforded the lower courts with ample guidance on the use of summary judgment in antitrust, as well as other contexts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). These decisions, cited and relied upon by the Courts below (A. 8) were applied as a mandate for summary judgment on Nobel's claims, " 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case [the relevant product market], and on which that party will bear the burden of proof at trial.' " (A. 8, quoting *Celotex*)

Nobel's failure to sufficiently establish the relevant product market had nothing to do with any alleged lack of guidance from this Court as to what evidence would be sufficient, but derived instead from an essential failure of proof detailed in the District Court opinion (A. 8-21).

Nobel's case ran squarely counter to the testimony of Nobel employees, employees of Nobel's distributor and laboratory customers who described the world of intense competition among laboratory analyzers and reagents. (*Id.*) Nobel's attempt to define a relevant product market limited to Beckman ASTRA and benchtop chemistry analyzers and reagents when performing tests stat, as opposed to in a routine manner (A. 12), was doomed to fail, not for lack of standards, but for lack of sufficient proof. Nobel supports its market definition argument in this Court (Pet. 14), as it did below, solely with affidavits which failed to meet the requirements of

Rule 56(e).[7] The statistical materials submitted by Nobel's president (Pet. 14, Ct.App.Jt.Apx. 1835-46, 2054-74) upon which Nobel's market argument rested were appropriately disregarded by the Courts below as inadequate under that Rule.

Nobel appends to the Petition (B. 1-12) an unpublished summary judgment decision by a Minnesota District Court in a settled lawsuit to which Respondent was a party. Petitioner's purpose in this inclusion is unclear. Conflict with a District Court's unpublished opinion is not an accepted ground warranting certiorari. (Rule 17, Sup.Ct.R.) Nobel does not expressly argue conflict. Different technologies, analyzers, reagents and laboratories were involved, and the Minnesota Court did not attempt to distinguish the opinions of the Courts below, which were available at that time. At most, this opinion is illustrative of the complex, circumstantial nature of such decisions, one litigant failing to offer sufficient proof to establish a triable issue as to the relevant product market, another litigant, in the view of the District Court, succeeding. The articulated standards did not differ (B. 5); the proof did.

The decision of the Courts below is in harmony with the summary judgment standards established by this Court. No additional guidance is required, nor appropriate in this case.

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[7] Rule 56(e) provides: ". . . affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

III. The Discovery Disputes Below Do Not Merit Certiorari

Nobel includes an argument in the Petition (Pet. 17-19) pertaining to discovery. This argument is not directed to any question for review but is apparently included with the hope that it will prejudice the Court's assessment of those questions. Suffice it to say that discovery disputes on both sides of the ledger were exhaustively heard in the District Court and Petitioner made this argument to the Court of Appeals. On the occasion when Nobel's counsel was invited by the magistrate in the District Court to present evidence to support his various charges, the invitation was declined. (Ct.App.Jt.Apx. 916-19) There is nothing worthy of note, much less worthy of certiorari, in the discovery disputes below. We will not burden the Court with a further response to this argument.

IV. This Court Should Retain Economic Analysis And The Relevant Product Market As The Basis For Antitrust Decision Making

Petitioner proposes, in its final question for review, a new *sui generis* form of antitrust violation—"a unilateral refusal to deal, motivated solely by a [sic] anticompetitive purpose and having an anti-competitive effect." (Pet. i) Nobel seeks to have the Court answer the question whether such described conduct is "a *per se* violation of the Sherman Act?" (*Id.*) Nobel's transparent purpose is to escape the necessity of establishing the relevant product market and engaging in meaningful economic analysis, preferring to focus instead "on the predatory nature of the defendant's conduct rather than the economic analysis." (Pet. 20)

Unfortunately for Petitioner, as recently as May 2, 1988, this Court made explicit its reliance on "economic analysis" as the foundation for its decisions in antitrust cases. *Business Electronics Corp. v. Sharp Electroncis Corp.*, 108 U.S. 1515, 56 LW 4387 (1988). The Petitioner's proposal to create a new form of *per se* unlawful conduct runs afoul of the premises of this Court's decisions in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) as articulated in *Business Electronics* that:

> . . . there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect. . . ." 56 LW at 4389.

Petitioner's proposal of *per se* illegality for a unilateral refusal to deal not only runs squarely counter to the recent decisions of this Court, but also was rejected almost seventy years ago by this Court in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). The District Court properly relied upon *Colgate* and *Monsanto* (A. 34) to dismiss this claim.

Neither in the question presented nor in its argument of the point (Pet. 19-21) does Nobel address which section of the Sherman Act such unilateral conduct is said to violate. This omission is studied. In the Courts below Nobel argued that such conduct was violative of §1 of the Act, despite the lack of concerted activity. The Courts below held that "Section 1 only applies, however, to a 'contract, combination or conspiracy,' and there is no dispute that the action taken by Beckman was unilateral." (A. 34) As Beckman's conduct was unilateral, the Court viewed the unilateral refusal to deal as a fact to

be assessed with Nobel's failed monopolization claim. (A. 34-5)

Nobel cites three Section 2 decisions of this Court as allegedly in conflict with the decision below.[8] These decisions are said to have correctly not "focused" on "economic analysis" or "relevant product market analysis," but rather purely on "predatory conduct" or motive. (Pet. 20) Market or economic analysis would hardly have been stressed in *Lorain Journal* or *Eastman Kodak*, both of which were decided before the relevant product market analysis was first applied in *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956). In *Otter Tail*, another Section 2 case, the defendant was a public utility which was held to possess a natural monopoly. Petitioner's proposed rule, which would eliminate any economic analysis in evaluating unilateral refusals to deal, is without support.

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[8] *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

CONCLUSION

Unless this Court is considering abandoning separate availability as a defense to a tying claim, or relevant product market analysis as essential to the consideration of monopolization or tying claims, or economic analysis as relevant to the proper resolution of antitrust issues, this is not an appropriate case for certiorari. It is plain that public policy requires the retention of these cornerstones of current antitrust doctrine. For that reason, the Petition for Certiorari should be denied.

Respectfully submitted,

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